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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DENNIS M. O'CONNOR, *et al.*,
Petitioners,

vs.

MAGNO J. ORTEGA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

JOHN K. VAN DE KAMP
Attorney General
of the State of California
MARVIN GOLDSMITH
Assistant Attorney General
JEFFREY T. MILLER
Deputy Attorney General
TERESA TAN
Deputy Attorney General

Attorneys for Petitioners

Counsel of Record:
JEFFREY T. MILLER
California Attorney
General's Office
110 West A Street, Suite 700
San Diego, California 92101
(619) 237-7762

12 pp

TABLE OF CONTENTS

	PAGE
SUMMARY OF ARGUMENT	1
A. THE CONTEXT OF AN ALLEGED GOVERNMENTAL INTRUSION IS RELEVANT TO THE QUESTION OF THE LEGITIMACY OF A PRIVACY EXPECTATION	2
B. THE WARRANT REQUIREMENT IS UNSUITED FOR THIS CONTEXT	6
C. THE ACTION TAKEN WAS REASONABLE UNDER ALL THE CIRCUMSTANCES	8
CONCLUSION	9

TABLE OF AUTHORITIES

PAGE

Baxter v. *Palmigiano*, 425 U.S. 308 (1976) 5
Camara v. *Municipal Court*, 387 U.S. 523 (1967) 7
Colonnade Catering Corp. v. *United States*, 397 U.S. 72 (1970) 7
Connick v. *Myers*, 461 U.S. 138 (1983) 2, 5
Gardner v. *Broderick*, 392 U.S. 273 (1968) 2
Garrity v. *New Jersey*, 385 U.S. 493 (1967) 5
Hudson v. *Palmer*, 468 U.S. 517, 525 (1984) 1, 3
Illinois v. *Lafayette*, 462 U.S. 640 (1983) 1, 4
Marshall v. *Barlow's, Inc.*, 436 U.S. 307 (1978) 7
New Jersey v. *T.L.O.*, 469 U.S. ____, 83 L.Ed.2d 720, 740 (1985) 8
Oliver v. *United States*, 466 U.S. 170, 178 (1984) 3, 4
See v. *City of Seattle*, 387 U.S. 541 (1967) 7
South Dakota v. *Opperman*, 428 U.S. 364 (1976) 4
Szmaciarz v. *State Personnel Bd.* 79 Cal. App.3d 904 (1978) 5
United States v. *Biswell*, 406 U.S. 311 (1972) 6, 7
United States v. *McIntyre*, 582 F.2d 1221 (CA 9 1978) 4
Wyman v. *James*, 400 U.S. 309, (1971) 1, 4

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SUMMARY OF ARGUMENT

The "context" of an alleged government intrusion is relevant to the threshold issue of whether Fourth Amendment protection is implicated. (*Hudson* v. *Palmer* 468 U.S. 517, 525, (1984); *Wyman* v. *James* 400 U.S. 309, 316-318 (1971).) An analysis into "context" involves the purpose of the governmental action, the kind of authority being exercised and the practical realities of justifying the action. (E.g., *Illinois* v. *Lafayette* 462 U.S. 640, 646-647 (1983).)

A public employee's reasonable expectation of privacy in the office is qualified by the employment relationship. The court has previously recognized that First Amendment (*Con-*

nick v. *Myers* 461 U.S. 138, 147 (1983)) and Fifth Amendment (*Gardner* v. *Broderick* 392 U.S. 273, 278 (1968)) rights are qualified or limited by the public employment relationship. By parity of reasoning, petitioners submit that a public employee's fundamental Fourth Amendment rights remain intact without stretching the scope of protection to encompass work-related office inventories or administrative searches.

The suggestion that a warrant based on probable cause is necessary for such government action is based upon a failure to recognize the practical realities of the public workplace. A warrant requirement in this context would cut deeply into government efficiency. Such a requirement simply is not supported by decisions of the Court or public policy considerations.

Specifically, the action taken in his case was "reasonable under all the circumstances" even assuming the Fourth Amendment would apply in such a context. Charges of sexual harassment, and departmental mismanagement, inter alia, justified not only respondent's placement on administrative leave but also the entry of his office and its inspection and inventory. This action was reasonably related, in scope, to the proper purposes of identifying and securing state property, and securing and removing respondent's personal property.

* * * * *

A. THE CONTEXT OF AN ALLEGED GOVERNMENTAL INTRUSION IS RELEVANT TO THE QUESTION OF THE LEGITIMACY OF A PRIVACY EXPECTATION

In our Brief for Petitioners, we recognized that Fourth Amendment protection indeed extends to one's office. We submitted, however, that the entry and inventory in this case, being for work-related concerns, did not constitute a "search" within the meaning of Fourth Amendment jurisprudence. (Pets. Br. at 8-9, 12-13, 25.) Nothwithstanding petitioners' recognition of the principle that an employee, whether public or private, would in his or her office be protected by the Fourth Amendment against unreasonable searches and seizures (e.g., by police or prosecutorial authorities in a criminal context),

amicus curiae in support of the judgment (hereinafter "invited amicus") seemingly ignores both petitioners' recognition and the narrow question under scrutiny in this case.

Invited amicus erroneously contends that it is petitioners' position a public employee may never have any reasonable expectation of privacy in the office and is subject to search and seizure by anyone for any purpose without Fourth Amendment protection. (Br., at 5, 7, 12, 18, 19, 21.) Such tilting at an imaginary windmill makes for facile argument, but detracts from a considered inquiry into the question of whether the entry into respondent's government-assigned office and the administrative office inventory in the course of his employer's administrative investigation into respondent's work-related conduct implicated the Fourth Amendment.

Petitioners submit, contrary to the contention of invited amicus (Br., at 21, fn. 13) that the justifiability, legitimacy or reasonableness of a government employee's expectation of privacy in his or her office[1] must be decided within the "context" of the governmental action in question. (See *Hudson* v. *Palmer*, 468 U.S. 517, 525 (1984).)[2]

Such an inquiry into "context" must address not only which governmental agency's action is involved, but also what the purpose of the action is. For example, although the sanctity

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[1] Contrary to the assertion of invited amicus that it is undisputed respondent had a subjective expectation of privacy in his office (Br. at 8), petitioners submit there is insufficient evidence to support the point. Respondent's self-serving statements concerning the privacy of his office fly in the face of the practical realities of the work place and are further undermined by his secretary's declaration that respondent took official files into his office and kept government correspondence there. (J.A. 20-21.) Contrary to the statement of the American Federation of State, County and Municipal Employees, AFL-CIO, as Amicus Curiae in support of respondent (Br. at 6, fn. 1), respondent was not permitted to use hospital time or grounds to counsel private patients. (J.A. 44.) Finally, on this point, a public employee cannot create a private domain by posting a name on an office door or keeping the door closed. (Cf. *Oliver* v. *United States*, 466 U.S. 170, 182 (1984).) In any event, it is appropriate to resolve the privacy issue in this case on the question of whether any such subjective expectation of privacy is one that society ought to recognize as reasonable.

[2] *Hudson* is cited not to equate government offices with prison cells, but as authority for the propriety of exploring Fourth Amendment "context" at the threshold.

of the home is a most paramount interest of Fourth Amendment jurisprudence (*Oliver* v. *United States, supra,* 466 U.S. 170, 178 (1984)) the Court has recognized that within the "context" of a social worker's home visitation for the purpose of verifying welfare assistance eligibility, the Fourth Amendment does not apply. (*Wyman* v. *James,* 400 U.S. 309, 316-318 (1971); alternatively holding that such a visit is not an unreasonable search, assuming Fourth Amendment applies).

The Fourth Amendment "context" approach taken in cases such as *Hudson* and *Wyman* establishes that factors such as agency identity and purpose are relevant to an inquiry of whether an expectation of privacy is legitimate, reasonable or justifiable. A similar approach has been used by the court in the criminal inventory search cases where governmental purpose is scrutinized. An inventory search of a criminal suspect's personal possessions without a warrant or probable cause where incidental to booking and jailing procedures is justifiable on the basis of safe and efficient operation of a police station. (*Illinois* v. *Lafayette,* 462 U.S. 640, 646-647 (1983); see also *South Dakota* v. *Opperman,* 428 U.S. 364, 367-376 (1976) vehicle inventory search without warrant or probable cause justifiable on basis of police caretaking interests, absent investigatory purpose.)

That an employee's reasonable expectation of privacy in his office can be qualified by the employment relationship is underscored by the case of *United States* v. *McIntyre,* 582 F.2d 1221 (CA 9 1978), relied upon by invited amicus (Br. at 24) for the proposition that respondent had a legitimate expectation of privacy in connection with the type of government action in this case. In *McIntyre,* police supervisors "bugged" an assistant chief's office for criminal investigation purposes. The Ninth Circuit reasoned as follows:

> "In any event, the 'bugging' here cannot be termed an 'administrative' search.

"Neither can the 'bugging' be justified as an 'internal affairs investigation'. An employer may search the work area of an employee for misplaced property or, in some circumstances, to supervise work performance. [Citations.] But defendants' purpose in 'bugging' McGann was, at least in part, to confirm their suspicion that he was involved in external crime (narcotics). Therefore, the 'bugging' was not an 'internal affairs investigation', but part of a criminal investigation . . . ." (*Id.*, at 1224.)

Nor should invited amicus derive comfort from *Connick* v. *Myers*, 461 U.S. 138 (1983) or *Garrity* v. *New Jersey* 385 U.S. 493 (1967)[3] for the proposition that constitutional freedoms are absolute and cannot be qualified by the public employment relationship. (Br. at 16.) To the contrary, while *Connick* reaffirmed that First Amendment protection applies to a government employee's "speech upon issues of public concern," such protection is not implicated when the public employee speaks upon a matter of personal interest (in *Connick*, expression critical of the public employer, *Id.* at 154.) In the context of speech, *Connick* noted in crafting its scope of First Amendment protection, the Court's responsibility "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State." (*Connick* v. *Myers*, *supra*, at 147.) Similarly,

[3] The issue in *Garrity* was narrow and of no relevance to this case, i.e., voluntariness of statements extracted from police officers in a criminal investigation, pursuant to a forfeiture-of-office statute. The Court held the choice between self-incrimination and job forfeiture was coercive. (*Id.*, at 496-500.) *Garrity* clearly does not stand for the proposition, as invited amicus suggests, that a public employee may invoke the Fifth Amendment privilege in a work-related investigation conducted by his superiors. The Fifth Amendment does not apply in such a context. (See *Gardner* v. *Broderick*, 392 U.S. 273, 278 (1968), concluding a police officer can be terminated for refusing to answer questions related to the performance of his duties; further concluding a termination cannot be predicated upon a refusal to waive the Fifth Amendment immunity. Accord, *Baxter* v. *Palmigiano*, 425 U.S. 308, 318 (1976)—Fifth Amendment does not apply in the context of a civil disciplinary proceeding against a public employee; *Szmaciarz* v. *State Personnel Bd.* 79 Cal.App.3d 904, 916-919 (1978)—Fifth Amendment does not apply in a California public employee personnel proceeding.)

petitioners submit that a public employee's fundamental Fourth Amendment rights remain intact without stretching the scope of protection to encompass such a work-related office entry and inventory.

In sum, although respondent may have had a reasonable expectation of privacy in connection with a police search of his office in a criminal context, for the reasons set forth in the Brief for Petitioners, respondent had no reasonable, legitimate or justifiable privacy expectation to be free from an entry and inventory of his government-assigned office by his supervisors in connection with an ongoing work-related investigation. As such, neither the entry into respondent's office nor its inventory were intrusions for Fourth Amendment purposes.

B. THE WARRANT REQUIREMENT IS UNSUITED FOR THIS CONTEXT

Invited amicus initially argues that an "investigative search" conducted by a public employer for work-related concerns may be made only pursuant to a warrant based on probable cause. (Br. at 25.) Such a process, the argument goes, will balance the competing interests of government and its employee. Later, invited amicus slightly retrenches by stating "almost all" of government's employment needs "can be satisfied without conducting an investigative search," because an employee must, as the rationale is presented, produce documents upon command or be terminated. (Br. at 34.) Therefore, the only purpose of an investigative search would be to "provide access to private materials." (Br. at 35.)[4]

[4] Such a tidy approach completely ignores the prospect of an employee destroying, altering or conveniently losing documents once it is known a requested production could establish substandard performance, or work-related wrongdoing. Further, such a position discounts the prospect of an employee stonewalling a request until substandard or incomplete work can be remedied. The real need of government in this regard, as in the private sector, is to have *immediate* access to government materials to monitor performance and work habits. Indeed, "unannounced, even frequent" access is often essential to proper supervision. (Cf. *United States* v. *Biswell*, 406 U.S. 311, 316 (1972).)

At the same time, invited amicus suggests that "routine office entr[ies do] not even raise a Fourth Amendment question." (Br. at 39) and, finally, on this point, issues a caveat that investigative searches concerning national security or other "sensitive matters" be subject to less justification. (Br. at 39.)

Such an ad hoc approach would produce confusion and paralysis among government supervisors, and, rather than offering guidance, would create a choice between supervisory inaction or potential damage liability for a possible civil rights violation. Imposition of such a choice would cut deeply into efficiency in government, and run counter to interests of society.

A requirement of a warrant based on probable cause in the context of government's work-related administrative inventory, inspection, or search of its employee's office is not supported by the Court's decisions. Even in the context of those cases requiring an administrative warrant for government's health or safety inspections of private property (e.g., *Camara* v. *Municipal Court*, 387 U.S. 523 (1967); *See* v. *City of Seattle*, 387 U.S. 541 (1967)), probable cause has not been required (*Marshall* v. *Barlow's, Inc.* 436 U.S. 307, 320-321 (1978)), even though safety, health, fire and housing regulations "are enforced by criminal processes."[5] (*Camara* v. *Municipal Court*, *supra*, at 531.) Analogizing to the business inspection cases, as both sides have, clearly the reasoning of *United States* v. *Biswell*, *supra*, 406 U.S. 311 and *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, (1970) would apply with much greater force than the *Camara-See* rational. If a warrant is unnecessary for governmental inspection of a closely regulated industry where frequent and flexible inspection is essential (*United* v. *Biswell*, *supra*), it would be anomalous to say that before government can oversee *itself* through inventories, inspections and administrative searches of its employees' offices for work-related concerns, it must obtain a warrant.

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[5] The lower court cases concerning a search of an employee's office, desk, or locker have dealt with either a criminal search by police or prosecution authorities for evidence of crime or civil litigation (a § 1983 action or injunctive relief). (Pet's. Br. at 16-20.) Case law development discounts the concern of invited amicus (Br. at 36-37) that office inventories or work-related administrative searches "may lead to criminal prosecution."

Government supervisors and employees under their supervision often share a special relationship based upon a "commonality of interests." (Cf. *New Jersey* v. *T.L.O.*, *supra*, 469 U.S. ____, 83 L.Ed.2d 720, 740 (1985); 105 S.Ct. 733 [Powell, J. concurring].) The spectre of such a supervisor serving an employee with a warrant to view government records in the employee's office, to monitor work performance or to investigate a work-related charge, is alarming. The warrant process in such a context would chill the relationship, if not render it completely adversarial in nature. Government civilian supervisors would become de facto law enforcement officers obligated to be familiar with finely spun theories of probable cause. Such a prospect must be avoided.

C. THE ACTION TAKEN WAS REASONABLE UNDER ALL THE CIRCUMSTANCES

Beyond the warrant issue, it is clear the action taken in this case was reasonable under all the circumstances. At its inception, the action was justified given the serious work-related charges leveled against respondent which included sexual harassment and mismanagement of employees. Nowhere in the brief of invited amicus is it suggested an inspection of respondent's office would not have been justified under any circumstances. Rather, invited amicus argues the scope of the "search" was overly broad and unreasonably intrusive.

Throughout the brief of invited amicus, the government action in this case has been mischaracterized as a search of personal property for evidence of wrongdoing. The reasons for the action authorized by petitioners included a need to identify and secure state property and records from respondent's office, to maintain access to State files, and to clear the office of its contents so it could be used by another employee. (Br. of Pets. at 4-5.) Under these circumstances, the scope of the inspection was necessarily broad so that any State property could be secured for continued State use and private property assembled and stored for respondent.[6]

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[6] Given the legitimate purposes which existed for the action authorized by petitioners, a warrant requirement would not have produced a different result in this case as the State would still have had a right and obligation to secure its property.

Petitioners re-emphasize that the entry, inspection, and inventory of respondent's office were reasonable in light of the context of the action as well as its purposes. There was a reasonable relationship between the scope of the "search" and the hospital's need to inventory the office and secure its own property.

CONCLUSION

For the foregoing reasons, petitioners urge reversal of the decision of the Court of Appeals. Respectfully submitted.

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General
of the State of California

MARVIN GOLDSMITH
Assistant Attorney General

JEFFREY T. MILLER
Deputy Attorney General

TERESA TAN
Deputy Attorney General

By: JEFFREY T. MILLER
Deputy Attorney General

Attorneys for Petitioners